



February 4, 2019

Via ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Subject: *Petitions for Reconsideration of CAF-II Metrics Order (WC Docket No. 10-90)*

Dear Ms. Dortch:

The most recent letter from Viasat¹ regarding its petition² and Hughes's petition³ related to the *Metrics Order*⁴ includes significant inaccuracies that require further response.

Viasat apparently misunderstands Hughes's uncontested statement that the *Metrics Order* was "in full force and effect" at the time of the nationwide Connect America Fund Phase II ("CAF-II") auction – and attacks it as a strawman argument.⁵ Viasat asserts that it would be "absurd on its face" if Commission orders that were "in full force and effect" could not be reconsidered.⁶ However, Hughes has never suggested that finality is a bar to reconsideration. Hughes has noted the *Metrics Order's* finality at the time of the nationwide CAF-II auction only to refute Viasat's earlier effort to portray the state of the law when the auction occurred as uncertain.⁷

Contrary to Viasat's claims (and notwithstanding its attempted misdirection with respect to the import of finality), the *Metrics Order's* specifications regarding high-latency bidders' obligations to conduct Mean Opinion Score ("MOS") testing of voice quality using only conversational-opinion

¹ Letter from John P. Janka and Matthew T. Murchison, counsel to Viasat, to Marlene H. Dortch, FCC, WC Docket No. 10-90 (filed Dec. 18, 2018) ("Viasat Letter").

² Petition for Reconsideration of Viasat, Inc., WC Docket No. 10-90 (filed Sept. 19, 2018) ("Viasat Petition").

³ Hughes, Petition for Clarification, or in the Alternative, Reconsideration, WC Docket No. 10-90 (filed Sept. 18, 2018),

<https://ecfsapi.fcc.gov/file/10919683808834/Hughes%20Petition%20for%20Clarification%20or%20Recon.pdf> ("Hughes Petition").

⁴ *Connect America Fund*, WC Docket No. 10-90, Order, DA 18-710 (WCB, WTB, OET rel. July 6, 2018) ("*Metrics Order*").

⁵ Viasat Letter at 1.

⁶ *Id.*

⁷ See Letter from Jennifer A. Manner, Hughes, to Marlene H. Dortch, FCC, WC Docket No. 10-90 (filed Dec. 7, 2018) ("Hughes Letter") at 3-4.

tests was clear at the time of the nationwide CAF-II auction.⁸ In fact, the main points in Hughes's most recent letter were the same as in its prior filings in this docket: (1) that the Commission *should not*, from a *policy* perspective, change the fundamental rules of its universal service auctions after those auctions are over,⁹ and (2) that the Commission *may not*, from a *legal* perspective, alter the gating criteria for auction participation in a way that amounts to prohibited retroactive rulemaking.¹⁰

Viasat also mangles Hughes's discussion of the retroactive rulemaking issues. Specifically, Viasat states incorrectly that "Hughes does not dispute" that the secondary retroactivity cases previously cited by Viasat "support Viasat's petition."¹¹ Quite the contrary. Hughes has consistently made clear that, "[f]rom a legal perspective, the petitions [both Hughes's and Viasat's] raise the question of whether the Commission can retroactively change the meaning of a gating criterion for a support auction after the auction is over. Here too the answer is clear—the Commission cannot."¹²

First, as Hughes has previously noted, secondary retroactivity precedent – (including the caselaw Viasat cites) is not applicable to "primary retroactivity" situations – those where the "purported rules [do] not merely affect past transactions but change what was the law in the past."¹³ And there is no question that granting the Viasat Petition now would change what the law was in July and August of 2018 when the CAF-II auction took place. Viasat's Petition "requests that the Bureaus eliminate the requirement that 'real-world' conversational-opinion testing proceed under ITU-T Recommendation P.800 and instead develop a workable testing methodology from the ground up."¹⁴ In other words, if Viasat's Petition were granted, high-latency bidders in the CAF-II auction would be required to meet the required MOS voice quality showing *not* via the procedure set out in the *Metrics Order* (which, again, was final when the auction took place) but rather through some new process as yet to be determined. This new process might or might not require conversational-opinion testing as specified in the ITU-T P.800 standard.

Whether the conversational-opinion test is required is crucial because, as Hughes has discussed, an objective ITU-T tool for estimating MOS scores based on network parameters predicts that a network with 600 ms round-trip latency (such as a geostationary satellite network) will achieve at best a MOS of 3.72.¹⁵ Thus, as Hughes has discussed at length in this docket, granting Viasat's petition would retroactively alter the gating criteria for the CAF-II auction.¹⁶ By

⁸ See, e.g., *id.* at 2-3.

⁹ See, e.g., *id.* at 2-3.

¹⁰ *Id.* at

¹¹ *Id.* at 2, citing *DIRECTV, Inc. v. FCC*, 110 F. 3d 816, 826 (D.C. Cir. 1997) and *Mobile Relay Associates v. FCC*, 457 F.3d 1, 10 (D.C. Cir. 2006).

¹² Letter from Jennifer A. Manner, Hughes, to Marlene H. Dortch, FCC, WC Docket No. 10-90 (filed Dec. 7, 2018) ("Hughes Letter") at 6.

¹³ Hughes Letter at 5, quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring).

¹⁴ Viasat Petition at 6.

¹⁵ See Hughes Reply at 2, 6-7 (discussing the ITU-T computational model G.107 which predicts that networks with 600 ms roundtrip latency, such as satellite networks, can achieve at best a 3.72 MOS score using the conversational-opinion test); Hughes Letter at 5 (same).

¹⁶ See, e.g., Opposition of Hughes Network Systems, LLC to Petition for Reconsideration by Viasat, Inc., WC Docket No. 10-90 (filed Nov. 7, 2018) ("Hughes Opposition") at 3 ("If the Commission now, after the auction

requiring conversational-opinion testing, the *Metrics Order* effectively announced that geostationary satellite-based providers could not participate in the auction without taking a fundamental risk of not being able to meet the performance criteria required for such participation. If the *Metrics Order* had not done so, participation in the CAF-II auction would have been different, and the auction results too could have differed.

In this sense, the discussion of the MOS testing framework in the *Metrics Order* is fundamentally different from its discussion of other issues, such as the number and frequency of speed tests that a support recipient must perform.¹⁷ Hughes is aware of no objective argument that such other issues impose an effective bar to a class of bidders' participation in the auction. Because other requirements adopted in the *Metrics Order* are not gating criteria for auction participation, reconsidering them would not appear to constitute retroactive rulemaking. But the requirement to conduct a conversational-opinion MOS test is a gating criterion for auction participation the impact of which is felt at the time the auction takes place.

As a result, granting Viasat's petition to completely rewrite the MOS testing framework would represent the same kind of prohibited retroactive rulemaking ("primary retroactivity") for other qualified bidders in the nationwide CAF-II auction as would applying the *Metrics Order's* MOS testing framework to participants in the New York auction. The "secondary retroactivity" cases Viasat cites therefore are inapplicable, and would not support the grant of its Petition. For these same reasons, contrary to Viasat's contention, Viasat's petition does *not* seek "prospective changes or clarifications that fit squarely within this precedent."¹⁸

Please direct any questions regarding this filing to the undersigned.

Sincerely,

/s/
Jennifer A. Manner
Senior Vice President, Regulatory Affairs

cc: Chelsea Fallon
Kirk Burgee
Sue McNeil
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has ended, modifies the testing standards that high-latency bidders must meet, it would upset bidders' settled expectations of the requirements for auction participation."); Reply of Hughes Network Systems, LLC to Oppositions and Comments on Petitions for Reconsideration, WC Docket No. 10-90 (filed Nov. 19, 2018) ("Hughes Opposition") at 8 ("For the same reason that Hughes's petition must be granted, Viasat's petition must be denied."); see also *id.* at 16 ("ADTRAN effectively argues that Hughes, as a participant in the NY Program auction, should be held to latency testing standards that were *not yet established* at the time it placed its bids, while Viasat, as a participant in the nationwide CAF-II auction, should be released from latency testing standards that were *clearly established* before its auction even began. Neither result can be countenanced as reasonable or lawful.").

¹⁷ See, e.g., *Metrics Order* at ¶¶ 27-28.

¹⁸ *Id.*